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No. 82-195

IN THE

Supreme Court of the United States

October Term, 1982

VAN D. MUELLER and JUNE NOYES,
Petitioners,

vs.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DEHAAN and DOROTHY DEHAAN,
Respondents.

BRIEF FOR RESPONDENTS DENNIS J. BERTHIAUME, ET AL., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does a Minnesota Income Tax Statute, which grants a taxpayer a deduction from gross income for the amount he has paid to others (not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12) for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school, wherein a resident of the state may legally fulfill the state's compulsory attendance law, which is not operated for profit and which adheres to the provisions of the Civil Rights Act of 1964, with no distinction being made as to whether or not such school is public or nonpublic, and with the requirement that such "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in the state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, meet the constitutional requirements as set down by the United States Supreme Court under the Establishment Clause of the First Amendment?

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OPINIONS BELOW

(Cited in the Petition for a Writ of Certiorari.)

JURISDICTION

(Stated in the Petition for a Writ of Certiorari.)

CONSTITUTIONAL PROVISIONS

1. The First Amendment to the Constitution provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. The Fourteenth Amendment to the Constitution provides in part:

> ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

The statute involved herein is part of the Minnesota Income Tax Statutes, set forth in Chapter 290, Minnesota Statutes, entitled "Income and Excise Taxes", the applicable portion thereof being § 290.09, Deductions from Gross Income, Subd. 22, which reads as follows:

> "Subd. 22. Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964[1] and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

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[1] 42 U.S.C.A. § 2000c et seq."

STATEMENT OF THE CASE

Subd. 22 of Minnesota Statutes § 290.09 is a part of the Minnesota Income Tax Statutes and has been in effect since 1955 (more than 27 years). It grants a taxpayer a deduction from gross income *for the amount he has paid to others* (up to a stated maximum for each dependent in grades K to 6 and a stated maximum for each dependent in grades 7 to 12) for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school, wherein a resident of Minnesota may legally fulfill the state's compulsory attendance laws, *without any distinction as to whether such school is public or nonpublic, religious or nonreligious.*

This statute, Subd. 22 of Minnesota Statutes § 290.09, *remained constitutionally unchallenged for more than 20 years.* In its first challenge, a three judge panel of the United States District Court for the District of Minnesota, in 1978, in the case of *MCLU v. Roemer*, 452 F.Supp. 1316 (D. Minn., 1978), upheld its constitutionality under the Establishment Clause of the First Amendment. In that case, the Court stated:

> "In our view the Minnesota law, if and when examined by the Supreme Court, will be found on the constitutional side of Jefferson's wall because the statute is neutral and neither advances nor impedes religious activity, benefits the parents of children attending both public and nonpublic schools, has received unchallenged historical acceptance, and is analogous to the long recognized practice of tax deductible contributions to religious and charitable causes by federal and state governments. Accordingly, the statute does not have the primary effect of advancing religion in violation of the Establishment Clause." (*MCLU v. Roemer*, supra at 1332)

Following this decision in *Roemer*, the law remained unchallenged until commencement of the present litigation, wherein its constitutionality was again upheld in the United States District Court for the District of Minnesota on May 13, 1981 and then, on appeal, was upheld by the United States Court of Appeals for the Eighth Circuit on April 30, 1982, in a decision which is the subject of the present Petition for a Writ of Certiorari.

It is not by mere accident that this Minnesota Tax Deduction Statute has been in existence for more than 27 years and has been constitutionally approved by every court which has considered the matter. This Tax Deduction Statute had already been in effect for more than a decade when the United States Supreme Court decisions began to carefully set forth the guidelines for constitutionality of statutes under the Establishment Clause and the Free Exercise Clause of the First Amendment: *Board of Education v. Allen*, 392 U.S. 236 (1968); *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); and *Meek v. Pittenger*, 421 U.S. 349 (1975). As each of these important First Amendment (Establishment and Free Exercise Clauses) Decisions came down, this Minnesota Tax Deduction Statute remained unchallenged, until its first challenge in the *Roemer* decision in 1978. As each of these decisions of the United States Supreme Court was announced, this Minnesota Tax Deduction Statute was seen as continuing to meet the most recent constitutional test, just as though the United States Supreme Court had this specific statute in mind as a model for a properly drafted and administered neutral Tax Deduction Statute under the Establishment Clause of the First Amendment. This statute has continued to meet *all* of these constitutional tests,

all of these constitutional guidelines. This statute is strictly a tax deduction statute *applicable to all taxpayers*. It has a *completely secular legislative purpose*. It is *completely neutral* and does not either advance nor impede religious activity. It is *completely free of any entanglement* between government and religion. If any state statute can pass muster under the constitutional requirements laid down by the United States Supreme Court under the Establishment Clause of the First Amendment, this statute qualifies unconditionally.

In the first constitutional challenge of this statute the Court in *Roemer* confirmed its compliance with all the constitutional tests and guidelines established by the United States Supreme Court, as cited above. We now are involved in the second challenge to this statute and the Trial Court in this case, in the United States District Court for the District of Minnesota, Judge Renner, concluded as follows:

> "Plaintiffs have failed to convince the Court that *Roemer* was incorrectly decided or that there are additional facts that demonstrate the statute has the primary benefit of advancing religion. Plaintiffs' statistical argument lacks credibility by reason of omissions of serious significance. The statute is neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion. The statute is constitutional and summary judgment in favor of defendant shall be entered." (Pet. App. A-31)

On appeal, the United States Circuit Court of Appeals for the Eighth Circuit properly held that this statute was a genuine tax deduction statute, that it met the three-pronged test of *Lemon*, that it was clearly distinguishable from the statute struck down in *Nyquist* and that it met the neutrality test set forth in *Walz*. (Pet. App. A-52)

The Court below considered an apparent conflicting decision from the United States Court of Appeals for the First Circuit, *Rhode Island Federation of Teachers v. Norberg*, 630 F. 2d 855 (1st Cir. 1980). While the challenged statutes in the *Norberg* case and in this case are identical, the statistical evidence submitted and considered by the courts in each case had significant differences. The Court below, in evaluating the benefits of the Minnesota Tax Deduction Statute, found "that there are substantial benefits flowing to all members of the public". (Pet. App. A-52) The Court then stated as follows:

> "By way of deduction we conclude, as defendants urge, that the State, in effect, abstains from taxing that income which has been denoted by a broad class of Minnesota citizens to their children's education. In so doing, the State has adopted a policy which is neutral toward religion by providing a tax benefit to those parents who qualify for a deduction for expenses incurred in sending their child to school." (Pet. App. A-52)

Having made this deduction from the statistical evidence and other evidence in the record, the Court below has reached a different decision from that of the First Circuit in the *Norberg* case, but these two decisions are based on *different facts*. The Court in *Norberg* did not have sufficient facts on which to make the kind of deduction which the Court below has made, as stated above. There is no *real* conflict between the decision in *Norberg* and the decision of the Court below, only an *apparent* conflict.

REASONS FOR NOT GRANTING THE WRIT

I. There is no real conflict among the Circuit Courts of Appeal.

While the Court below was concerned with the decision of the United States Court of Appeals for the First Circuit, in the *Norberg* case, wherein the First Circuit considered and struck down a recent Rhode Island statute patterned after the Minnesota Tax Deduction Statute which is being considered in this case, and the Court below clearly thought the decision of the First Circuit Court in *Norberg* was wrong and said so, it is clear that the statistical data involved in this case was such that the Court below could easily recognize and appreciate the fact that "substantial benefits" flow from this Minnesota Tax Deduction Statute "to all members of the public". The statistical evidence and other facts available to the First Circuit Court in the *Norberg* case apparently did not support such a deduction; therefore, there is no real conflict between the decision of the Court below for the Eighth Circuit and the decision of the Court for the First Circuit in *Norberg*—there is only an *apparent* conflict. Such an apparent conflict is not sufficient reason for the United States Supreme Court to grant a Writ of Certiorari and review the decision of the Court below.

II. The decision below follows and does not conflict with prior decisions of this Court.

As set forth in the Statement of the Case, above, the decision of the Court below complies fully and completely with all of the applicable constitutional guidelines and tests set forth by the United States Supreme Court in a long and distinguished line of cases concerning the constitutionality of statutes under the Establishment Clause and the Free Exercise Clause of the First Amendment. As set forth in the decision of the Court below, this Minnesota Tax Deduction Statute does not conflict with any of the decisions of the United States Supreme Court cited by Petitioners in their Petition for a Writ of Certiorari. The Court below has clearly and correctly considered each of the prior decisions of the United States Supreme Court which are applicable here and this Minnesota Tax Deduction Statute has been found to comply with the tests and guidelines established by those cases and has passed constitutional muster. The Court below has clearly and correctly set forth and applied the governing law in this case. Any "misapprehension of governing law" is strictly the plaintiffs' and not the Eighth Circuit's.

CONCLUSION

The Petitioners have failed to establish that the decision of the Eighth Circuit below, upholding the constitutionality of a portion of the Minnesota Income Tax Deduction Statutes (which challenged portion has been in effect for more than 27 years and was previously upheld by a United States District Court three judge panel, for the District of Minnesota, in 1978) is in any real conflict with the decision cited by Petitioners from the United States Court of Appeals for the First Circuit concerning a similar statute, so as to be of any real concern to this Court, and the Petitioners have failed to establish that the decision rendered by the Eighth Circuit below departs from the prior decisions of this Court relating to the constitutionality of a state statute under the Establishment Clause of the First Amendment. CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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